SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 809

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
BUENA VISTA DISTRIBUTION CO., INC.,
METRO-GOLDWYN-MAYER, INC., and
PARAMOUNT FILM DISTRIBUTING CORPORATION,
Respondents.

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

BLUMENFELD ENTERPRISES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cases on October 22, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in CCH Trade Cases, Para. 71,592; ____ F.2d ____ (1965). A copy of this opinion is attached hereto as Appendix A. The opinion of the District Court for the Northern District of California, Southern Division, is reported at 232 F.Supp. 556. A copy of this opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the U. S. Court of Appeals for the Ninth Circuit was entered on October 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

In a private antitrust case where plaintiff and one defendant execute a release which is silent as to its effect upon non-signatory co-conspirators who are not parties to the action, does federal law conclusively preclude plaintiff from subsequently suing such non-signatory co-conspirators in another action?

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of

> commerce among the several states, or with the foreign nations, is declared to be illegal . . ."

Section 4 of the Clayton Act (15 U.S.C. 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

On November 4, 1958, Rancho Drive-In Theatre Corporation,[1] a motion picture exhibitor, brought an antitrust action pursuant to Section 4 of the Clayton Act (15 U.S.C. 15) against two competing motion picture exhibitors, Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc. (R. 245-249.) The complaint alleged that the defendant exhibitors had restrained commerce in the interstate distribution of motion picture films in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by, *inter alia,* illegal agreements with motion picture distributors. (R. 247-248.) The distributors were not named as defendants, were not expressly designated as co-conspirators and were not identified by name in the complaint. (R. 245-249.)

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[1] "Rancho Drive-In Theatre Corporation is the same corporation as petitioner Rancho Drive-In Theatre, Inc." (R. 99, lines 6-7.)

As of May 11, 1959, plaintiff Rancho Drive-In Theatre Corporation entered into an agreement with one defendant, Fox West Coast Theatres Corporation, which provided for the dismissal of the action filed November 4, 1958, and for the execution of a general release (R. 257-259) in a form which was attached as an exhibit to the agreement (R. 261-263). That release was executed on June 8, 1959, by Raymond J. Syufy, president of the releasor corporations, Rancho Drive-In Theatre Corporation and Bell Drive-In Theatre, Inc., and several others. The release recited that "this release shall not cover any claims of Releasors against United Artists Theatre Circuit, Inc., a defendant in said action." (R. 263.)

Thereafter, on August 13, 1959, another general release, based upon a recited consideration of three thousand, two hundred dollars ($3,200), was executed by and on behalf of the same persons as releasors in favor of Fox West Coast Theatre Corporation. The release did not refer to any litigation and contained no reservation of rights against anyone.

On December 28, 1960, petitioners filed the complaint in the case at bar against certain motion picture distributors, including respondents and certain exhibitors, including Fox West Coast Theatre Corporation, alleging a conspiracy to restrain trade and commerce in the interstate distribution of motion pictures. (R. 1-7.) Two of the petitioners (Rancho Drive-In Theatre, Inc., and Bell Drive-In Theatre, Inc.) had signed the August 13, 1959 release; the other two petitioners (Winchester Drive-In Theatre, Inc., and Syufy Enterprises, Inc.) had no interest, prior to August 13, 1959 in the theatres involved in the action.[2]

On September 6, 1963, respondents moved for a partial summary judgment for the period prior to January 1, 1958 (R. 27-28). They contended that as a matter of law they were discharged from liability by the general release of August 13, 1959 (R. 71-72). The motion was denied (R. 71-75) on the ground that an issue of fact existed as to whether the August 13, 1959 general release encompassed the claims in the instant action (R. 74).

Thereafter, appellees and defendant Fox West Coast Theatres Corporation stipulated that

> "* * * plaintiffs are seeking no damages from defendant Fox West Coast Theatres Corporation for the period prior to August 13, 1959, said date being the date of a General Release executed by plaintiffs and on their behalf to said defendant" (R. 107). That stipulation was filed in the instant case on April 22, 1964.

On May 18, 1964, appellants moved for partial summary judgment for all claims prior to August 13, 1959. The District Court on July 1, 1964 filed an order denying the motion. (R. 267A-267N.) Noting "the variety of state law on the subject and the uncertainty of modern conflict of

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[2]Petitioner Winchester Drive-In Theatre, Inc., was incorporated on July 1, 1960, and commenced operation on November 22, 1960 (R. 82, line 29). It owns the Winchester Drive-In Theatre (R. 2, lines 7-9). There is no claim for damages with respect to the operations of that theatre prior to its opening in November of 1960 (R. 98, lines 9-11). The only claim for damages by appellee Syufy Enterprises, Inc., for the period prior to August 13, 1959, "is based upon its contention that it is the successor in interest to Raymond J. Syufy doing business as Syufy Enterprises" (R. 99, line 28, to 100, line 1), one of the releasors expressly named in the August 13, 1959 release.

law rules . . . the Court concludes that federal rather than state governs the effect of a general release on non-signatory joint tort feasors in an action under the federal antitrust laws." (R. 267N.)

The District Court noted that its search of the federal law with respect to the effect upon non-signatory co-conspirators of a general release silent as to its purported effect upon such non-signatory co-conspirators produced no case directly in point. In discussing the Restatement of Torts, Sec. 885(1)[3] as one of the possible federal rules, the District Court concluded that it was "inadequate . . . for federal antitrust cases" because it "ignore[s] the fact that the plaintiff usually intends to release only the signatory tortfeasor." (R. 267L.) Noting that the Restatement rule was "an improvement" on the English rule, the District Court reasoned that it was "still a trap for the unwary and today appears to be based solely on a metaphysical notion of the early common law and without consideration of the modern realities of business litigation, particularly in the antitrust field." (R. 267L.)

Thus the District Court chose to adopt the rule embodied in Section 4 of the Uniform Contribution Among Joint Tort-Feasors Act (hereinafter UCATA)[4] because

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[3]Restatement of Torts, Section 885(1) provides:

"A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others, and, if the release is embodied in a document, unless such agreement appears in the document."

[4]Uniform Contribution Among Joint Tort-feasors Act, Section 4 provides:

"A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the

that rule was "more in line with the normal intention of the parties to a release . . . does not create a trap for the unwary . . . and . . . prevents double recovery without resort to artificial concepts . . ." (R. 267M.)

The order of the district court of July 1, 1964 certified for an interlocutory appeal pursuant to Section 28 U.S.C. 1292(b) the question of "what rule the federal courts should apply to govern the effect of a general release in a federal antitrust case." (R. 267N.) The Court of Appeals for the Ninth Circuit granted leave to appeal, and, on October 22, 1965 filed an opinion per Judge Stanley Barnes reversing the order of the district court.

Relying, in part, upon this Court's opinion in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952) the Court of Appeals agreed with the district court that federal rather than state law governed the effect of a release on non-signatory conspirators in a federal antitrust case.[5] More-

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other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

[5]We agree with the cogent reasons advanced by both Courts below in support of their respective rulings that federal rather than state law controls. Accordingly, we do not directly present that question in this petition. We recognize, however, that the question is implicit in the "Question Presented." We further note that the decision of the Court of Appeals is in conflict with decisions in at least one other circuit on this question. See *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) and *Eagle Lion Films v. Loew's, Inc.*, 219 F.2d 196 (2d Cir. 1955). In *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3d Cir. 1957), the Court stated the issue but did not decide it. A split of authority on this point among the district courts is shown by cases collected in the District Court's opinion. (Appendix B, p. xi.) Thus, the Court of Appeals in this case is the first appellate court to squarely hold that federal law applies.

over the Court of Appeals, citing this Court's opinion in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 500-501 (1964), noted that the "outmoded" English has been "repudiated" in cases arising under Federal law.

The Court of Appeals rejected the rule adopted by the district court (based upon Section 4 of UCATA) and instead adopted the rule based upon Section 885(1), Restatement of Torts that a release of one joint tort-feasor releases all unless the written release reserves the claim against the others. In doing so the Court of Appeals stated that the district court had "exceeded the bounds of judicial authority and has entered the province of legislative concern." Citing one case in the Third Circuit and three district court cases[6] the Court of Appeals concluded that "the present Restatement position is an accurate expression of the current status of the law of general releases." The Court of Appeals reasoned that its rule—the Restatement rule—was not harsh because it "merely requires that he [the releasor] announce his intent, and express that reservation in the release agreement." Moreover the Court declared that this rule "had the substantial advantages of eliminating disputes as to the intended scope of the release" and that "[i]t discourages chicanery in the negotiation of the release" and imposes no "heavy burden on counsel charged with the responsibility of drafting the instrument."

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[6]The cases cited by the Court of Appeals are: *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3rd Cir. 1957); *Combined Bronx Amusements v. Warner Bros. Pictures*, 132 F. Supp. 921 (S.D.N.Y. 1955); *Rector v. Warner Bros. Pictures*, 102 F. Supp. 263 (S.D.Cal. 1952); *Michael Rose Productions, Inc. v. Loew's, Inc.*, 141 F. Supp. 257 (S.D.N.Y. 1956).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD CONSIDER ALL OF THE ALTERNATIVES AND THEN ANNOUNCE THE APPLICABLE RULES GOVERNING THE EFFECT OF A RELEASE ON NON-SIGNATORY TORT-FEASORS IN CASES ARISING UNDER FEDERAL LAW.

A. The Decision of the Court of Appeals Read in Context With This Court's Decision in Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964) Creates an Incongruity in the Law.

The rule adopted by the Court of Appeals precludes an antitrust plaintiff who enters into a release agreement with one alleged conspirator from maintaining the action against all non-signatory co-conspirators unless the release agreement specifically reserves the claim against others wholly apart from the consideration paid for the release and the actual—perhaps undisputed—intention of the parties. In short, the plaintiff's claim is *entirely* dependent upon the *form* of the release instrument.

But this Court in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) held that even where a releasor expressly reserves his claim agains non-signatory joint tort-feasors, his right to recovery may be defeated by a factual showing that the consideration paid for the release in fact constitutes full satisfaction of the entire claim. Thus this Court said:

> "Where a private release of past infringement which does not purport to release others is involved, *the adequacy of the compensation must always be a question of fact.*" *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 513 (1964) (Emphasis supplied).[7]

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[7]The release in issue here clearly "does not purport to release others".

While this Court has held that a mere recitation of reservation against non-signatory joint tort-feasors does not *automatically* permit recovery if after probative analysis full recovery has already been had, the Court of Appeals' decision *finally* and *conclusively* precludes plaintiff from maintaining the action against non-signatory conspirators unless there is a written recitation of that reservation in the release instrument. Thus in one instance the writing establishes only a rebuttable presumption while in the other the writing itself is deemed conclusive. From the viewpoint of the antitrust plaintiff this is a "heads-you-win-tails-I-lose" proposition.

We respectfully submit that this incongruity—which always operates in favor of defeating the plaintiff's claim—results from the preoccupation of the Court of Appeals in formulating a rule which "eliminate[s] disputes." And in adopting the Restatement rule—which admittedly has that advantage—the Court of Appeals merely substitutes one inflexible, mechanical rule for the more ancient, but equally inflexible, mechanical English rule. The Court of Appeals' rule giving precedence to form rather than substance flouts the admonition of this Court made in another context that "Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 527 (1963).

B. The Decision of the Court of Appeals Has Ignored Modern Day Commercial Reality.

Reasoning that its rule "merely" requires the plaintiff to expressly reserve the claim against non-signatory conspirators and that this imposes not too heavy a burden on

"counsel charged with the responsibility of drafting the instrument," the Court overlooks the following realities:

1. As observed by the district court: "Most antitrust cases are settled before reaching trial". (R. 267J.) The following table, prepared by the Administrative Office of the United States Courts reflects the accuracy of that observation for the fiscal years 1962-1965:

UNITED STATES DISTRICT COURTS

Private Civil Antitrust Cases Terminated During the Fiscal Years 1962-1965

Fiscal Year	Total	No Court Action	Before Pretrial	During or After Pretrial	Cases Tried		Percent Reaching Trial
					Court	Jury	
1965	1,036	395	261	341	14	25	3.8
1964	765	179	236	315	20	15	4.6
1963	312	102	100	68	20	22	13.5
1962	256	82	77	60	19	18	14.5

Lest there be any doubt that these figures may be distorted by the large number of electrical equipment cases in those years, statistics for prior years lead to the same conclusion. In the fiscal years 1952-1958, 1,530 private antitrust cases were commenced.[8] During the calendar years 1952 through late 1958, it has been reported that 161 private antitrust cases were actually tried.[9] While not correlative as to time and therefore not precise, these statistics nonetheless lead to the conclusion that the overwhelming majority of private antitrust cases are settled.

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[8]Annual Reports of the Director of the Administrative Office of the United States Courts 1960 and 1961; House Doc. 240, 85th Congress.

[9]Robert Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 Antitrust Bulletin 5, 11-12 (1959).

And settlements often, if not usually, involve releases. But even the "outmoded" rules which are supposed to have the advantage of "eliminating disputes" have not accomplished that objective: See *Combined Bronx Amusements v. Warner Bros. Pictures,* 132 F.Supp. 921 (S.D.N.Y. 1955); *Dale Hilton, Inc. v. Triangle Publications, Inc.,* 198 F.Supp. 638 (S.D.N.Y. 1961); *Dura Electric Lamp Co. v. Westinghouse Electric Corp.,* 249 F.2d 5 (3rd Cir. 1959); *Eagle Lion Films v. Loew's, Inc.,* 219 F.2d 196 (2d Cir. 1955); *Michael Rose Productions v. Loew's, Incorporated,* 141 F.Supp. 257 (S.D.N.Y. 1956); *Rector v. Warner Bros. Pictures,* 102 F.Supp. 263 (S.D. Calif. 1952); *Rohlfing v. Cat's Paw Rubber Co.,* 17 F.R.D. 426 (N.D. Ill. 1954); *Solar Electric Corp. v. General Electric Co.,* 156 F.Supp. 51 (W.D. Pa. 1957); *Taxin v. Food Fair Stores, Inc.,* 197 F.Supp. 827 (E.D. Pa. 1961); *Vines v. General Outdoor Advertising Co.,* 171 F.2d 487 (2d Cir. 1948), all involving "disputes" re the effect of joint tort-feasor releases in antitrust cases.

2. Today, releases almost invariably are drafted not by plaintiff's counsel but by defendant's counsel. The typical antitrust defendant is a large or at least medium size corporation usually represented by the largest, most able law firms in the community; antitrust plaintiffs are ordinarily persons of small means often represented by counsel who are far less sophisticated about the complexities of both antitrust law and federal procedure.

3. Some settlements and releases take place even before a lawsuit has been filed often as part of business, rather than legal, negotiations and not infrequently before the plaintiff is represented by counsel. Thus the Court of

Appeals imposes not on lawyers but on laymen the "burden" of expressly reserving rights in a release.

4. The intention of the plaintiff is almost invariably to release only the signatory. Rarely does an antitrust plaintiff effect an early settlement as to solvent defendants whose actions had a substantial injurious impact upon him. Rather, plaintiffs will usually settle at a relatively early stage with defendants whose complicity—at least in terms of inflicting damage on the plaintiff—is less than others. Or plaintiffs will sometimes settle early with defendants whose financial position is such that plaintiff would not ordinarily look to that defendant for payment if the case were prosecuted to judgment. Or plaintiffs may settle early with those defendants whose connection with the alleged conspiracy is more remote or who may assert a *sui generis* legal defense. Often settlements as to less than all defendants are effected because plaintiffs need funds with which to continue the prosecution as to the defendants deemed more culpable. Recognizing these pragmatic commercial considerations, the district court incisively and correctly concluded that "the plaintiff usually intends to release only the signatory tortfeasor." But, this important premise is not even discussed by the Court of Appeals in its opinion.

It cannot seriously be urged that justice will be done under a rule which is designed only to "eliminate disputes" and "discourage chicanery" but which takes absolutely no account of the realities. Is not the rule adopted by the Court of Appeals but another "niggardly" approach to the effective enforcement of the antitrust laws? *Cf. Leh v. General Petroleum Co.*, ____ U.S. ____ (1965), decided November 8, 1965.

C. This Court Should Fashion a Rule Consistent With Its Pronouncement in Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964). Such a Rule Must Accommodate Those Reasons Underlying the English Rule Which Have Modern Day Vitality While Insuring Against An Arbitrary Result.

The Court of Appeals has failed to consider all of the alternative rules. Having discarded the "outmoded" English rule, the Court of Appeals narrowed its choice to the Restatement rule and the UCATA rule. But the inadequacy of both these rules is that the effect of the release vis-a-vis non-signatory conspirators is to be determined solely by the language appearing on the face of the agreement.[10] It appears that the Court of Appeals may have been led to adopt the Restatement rule because it misread this Court's reference to that rule in *Aro* as a citation "with approval." In fact this Court—if we read *Aro* correctly—did no more than cite the Restatement as an *example* in support of the proposition that the "overwhelming weight of scholarly authority" has repudiated the English rule. 377 U.S. at 500-501. But what the Court of Appeals ignores is that in the same context and on the same pages this Court cites Professor Prosser no less than *three* times. And Prosser's rule—different from both the Restatement and the UCATC rules—we respectfully submit is the *best* rule to insure justice between the parties.

Professor Prosser, Torts, 1955 edition, at page 245 formulates the following approach to this complex problem:

[10]This "vice" is less important in the case of UCATA rule which is in accord with this Court's holding in *Aro* that the claim may be defeated if in fact the consideration paid for the release fully satisfies the claim. In the case of the Restatement rule there is no such "saving" principle.

> "The only desirable rule would seem to be that a plaintiff should *never* be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it. Where there has been such full satisfaction, or where it is agreed that the amount paid under the release is so received, no claim should remain as to any other tortfeasor; but these are questions of fact, and normally to be determined by the jury, where the amount of the claim is unliquidated. The release, however, may very well be taken as a prima facie acknowledgment of satisfaction, and the burden placed upon the plaintiff to prove that it is not. The requirement that an express reservation of rights against other tortfeasors be inserted in the release itself seems unfortunate, when releases frequently are given by plaintiffs ignorant of the law and without legal advice. If it is clear that the satisfaction received was understood to be only partial, it should not discharge the claim against the second tortfeasor. All courts are agreed, however, that it must be credited pro tanto to diminish the amount of damages recoverable against him, irrespective of an agreement that it shall not, and regardless of whether it was received under a release or a covenant not to sue."

See also *The Effect of a Settlement With One Co-Obligor upon the Obligations of the Others*, Prof. Harold C. Havighurst, Northwestern University, School of Law, 45 Cornell Law Quarterly, No. 1, Fall, 1959.

The Prosser approach read as an interlacing text with this Court's decision in *Aro* would "complete the circle" —remove the incongruity in the law created by the opinion

of the Court of Appeals. Restated the following set of clearly defined principles would emerge:

1. A release of one conspirator operates to release the others only if (a) the releasor intends to release the others or (b) the compensation paid for the release constitutes full satisfaction of the claim, without respect to whether or not the release expressly reserves the claimant's rights as to the other conspirators.

2. Where the release expressly reserves the right, the burden is on the conspirators claiming the benefit of the release to show that the claimant has received full satisfaction. This is, of course, a question of fact.

3. Where the release does not expressly reserve the right, the burden is on the plaintiff to show both (a) that the parties did not intend to release the other conspirators and (b) that the consideration paid for the release did not constitute full satisfaction of the claim. These are also questions of fact.

4. In any instance that the claim is found to have been preserved in fact against the other conspirators, the consideration paid for the release must be credited *pro tanto* to diminish the amount of damages recoverable from the others.

This set of principles accommodates the only rationale of the English rule which has present-day application: it would insure against unjust enrichment through a series of successive settlements. At the same time it also insures that those who have violated the antitrust laws do not fortuitously defeat a legitimate claim.

CONCLUSION

This Court should reject the adoption of a mechanical, arbitrary and, harsh rule, particularly in an area important to the preservation of a free competitive system. In *Aro* this Court has decisively taken the first step in that direction in respect to this small but important area of our jurisprudence. The decision of the Court of Appeals so impedes the development of a symmetrical body of law in this area that review by this Court after full briefing and argument is imperative. Though the record here is small and the issue quite precise its importance in the overall enforcement of the antitrust laws by private actions cannot be doubted. Allowing the decision of the Court of Appeals to stand without review will discourage the efforts of district judges to fashion principles which further the policy of the antitrust laws. Another result of inaction by this Court will be to encourage able defense lawyers to "spring the trap" on unwary plaintiffs, thus granting to antitrust violators a fortuitous benefit. Consequently, the policy of encouraging enforcement of the antitrust laws through private actions will be seriously undermined. We respectfully urge this Court to grant certiorari.

Dated, San Francisco, California,
December 6, 1965.

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(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TWENTIETH CENTURY-FOX FILM CORPORATION, BUENA VISTA DISTRIBUTION CO., INC., METRO-GOLDWYN-MAYER, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION, *Appellants,* vs. WINCHESTER DRIVE-IN THEATRE, INC., SYUFY ENTERPRISES, INC., RANCHO DRIVE-IN THEATRE, INC., and BELL DRIVE-IN THEATRE, INC., *Appellees.*	No. 19,400
BLUMENFELD ENTERPRISES, INC., *Appellants,* vs. WINCHESTER DRIVE-IN THEATRE, INC., SYUFY ENTERPRISES, INC., RANCHO DRIVE-IN THEATRE, INC., and BELL DRIVE-IN THEATRE, INC., *Appellees.*	No. 19,402

[October 22, 1965]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: BARNES, BASTIAN and MERRILL, Circuit Judges

BARNES, Circuit Judge:

This appeal comes before us under certification of the district court that a controlling question of law is involved as to which there is a substantial ground for difference of opinion. As required by statute (28 U.S.C. § 1292(b)), we granted permission to appeal on the question contained in the certificate issued by the district court. That single controlling question, as framed by the district court, is "what rule the federal courts should apply to govern

the effect of a general release in a federal antitrust case." He concluded there was no clear answer, and we agree.

We note at the outset that our attention is addressed to the single issue certified by the district court and to no other. We are required to construe the extraordinary relief provided by 28 U.S.C. § 1292(b) in its narrowest sense if we are not to thwart the judicial policy against interlocutory appeals and their resultant dilatory consequences. Thus, only two questions are presented on this appeal for our determination:

1. Does federal or state law govern the effect of releases in federal antitrust actions?

2. If federal law governs, does a general release of one joint tort-feasor release all joint tort-feasors?

As noted by the certificate issued by the district court, the controversy giving rise to this appeal involves an alleged violation of the antitrust laws. On November 4, 1958, prior to the date the present action was filed, the Rancho Drive-In Theatre Corporation, a motion picture exhibitor in Richmond, California, filed an antitrust action against Fox West Coast Theatre Corporation and United Artists Theatre Circuit, Incorporated (hereinafter sometimes referred to as the *Rancho* case). On May 11, 1959, plaintiff in the *Rancho* case entered into an "Agreement for Dismissal of Action and General Release" with Fox West Coast Theatres Corporation. The signatories to the release provided that all those parties whom the signatories were authorized by law to represent were also to be bound by the terms of the release.[1]

[1] "THIS INSTRUMENT, wherein RAYMOND SYUFY, WILLIAM SYUFY, NORTHERN THEATRES & REALTY CORPORATION, SYUFY MOTOR MOVIES, INC., RANCHO DRIVE-IN THEATRE CORPORATION, GENEVA DRIVE-IN THEATRE, INC., RENO DRIVE-IN THEATRE, INC., BELL DRIVE-IN THEATRE, INC. AND BLUEBELL DRIVE-IN THEATRE, INC., and every person, firm, estate or corporation which the foregoing, or some or any of them, acting alone or together, are authorized by law to bind, and each of them jointly and severally, are Releasors, and FOX WEST COAST THEATRES CORPORATION, a Delaware corporation, its past and present parents, subsidiaries and affiliates, predecessors, successors, assigns, directors, officers, employees and agents, and the directors, officers, employees and agents of said past and present parents, subsidiaries, affiliates, predecessors, successors and assigns, are Releasees."

The instrument also expressly reserved to the releasors any claims which they might have against the other defendant in the *Rancho* action, United Artists Theatre Circuit, Incorporated.[2] Pursuant to stipulation, the action was dismissed as to defendant Fox West Coast only on June 8, 1959.

Thereafter, on August 13, 1959, another general release was executed by and on behalf of the same persons. This "General Release," is reproduced in part in the margin.[3] It made no mention of the pending action against United Artists. That action, however, was subsequently dismissed on February 26, 1963.

On December 28, 1960, the present action was filed by certain parties whose interests had been represented by the rleasors in the *Rancho* action, as well as by two corporations, Winchester Drive-In Theatre, Inc. and Syufy Enterprises, Inc., neither of which had an interest in the *Rancho* case prior to August 13, 1959.

On March 3, 1963, the distributor defendants as well as the exhibitor defendant other than Fox West Coast and United Artists filed their answers raising a defense based upon the release of August 13, 1959. A motion for partial summary judgment on the basis of the general release defense was denied without

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[2]"Without in any way limiting the generality of the foregoing general release, it is understood that the same specifically includes any and all claims which have been asserted and which might be asserted in that certain action entitled *'Rancho Drive In Theatre Corp., Plaintiff, v. Fox West Coast Theatre Corp. and United Artists Theatre Circuit, Inc., Defendants'*, pending in the United States District Court for the Northern District of California, Southern Division, No. 37792 in the files of said court; provided, however, that this release shall not cover any claims of Releasors against United Artists Theatre Circuit, Inc., a defendant in said action."

[3]"For and in consideration of the sum of $3,200.00 paid by Releasees to Raymond Syufy (who is hereby authorized by each Releasor to receive said sum on his, her, and its behalf) Releasors, and each of them release and discharge Releasees, and each of them, from any and all claims, demands or causes of action, known or unknown, against Releasees, or any of them, which Releasors, or any of them, now own or hold, have at any time heretofore owned or held, or may at any time hereafter own or hold, by reason of any matter, cause or thing whatsoever done, omitted or suffered to be done prior to the date of this instrument."

prejudice on the ground that an issue of fact existed as to whether the August 13, 1959 release encompassed the claims in the instant action. Subsequent thereto, attorneys for plaintiffs and Fox West Coast stipulated in writing "that plaintiffs are seeking no damages from defendant FOX WEST COAST THEATRES CORPORATION for the period prior to August 13, 1959 . . . ." Thereafter, a second "Motion for Partial Summary Judgment" was denied by the district court. The court concluded that federal rather than state law governed the effect of a general release in an antitrust action. The court then adopted as the federal rule that a general release does not discharge the other joint tortfeasors unless it expressly provides for their discharge. The propriety of that ruling is the issue that the district court has certified as a controlling question of law for our consideration.

I. *State versus federal law.*

Attorneys of all parties concede, as found by the district court, that a conflict exists as to whether state or federal law governs the effect of a release in a federal antitrust case. The uncertainty of the current state of the law on this question was noted by the third circuit in *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3rd Cir. 1957). Some federal trial courts have held that state law applies. See, *e.g.*, *Solar Electric Corp. v. General Electric Co.*, 156 F.Supp. 51 (W.D. Pa. 1957). Others have unequivocally stated that federal law applies. *Taxin v. Food Fair Stores, Inc.*, 197 F.Supp. 827 (E.D. Pa. 1961); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 198 F.Supp. 638 (S.D.N.Y. 1961). No abstract notions arising from a so-called substance-procedure dichotomy can be relied upon to resolve this conflict in result. *Cf. Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Whether state or federal law should govern the question posed by this appeal must be made dependent upon considerations of public policy which transcend any static theories of law.

In the present matter we are concerned with rights created under federal law. We are concerned with a federal statute which seeks to regulate business conduct that affects commerce crossing state lines. Allegations of proscribed conduct under the antitrust laws most frequently involve charges of illegal activities transcending state, regional, and even national boundary lines.

Although the Supreme Court has not treated the problem of the effect of a release in a federal antitrust case, we find its position in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952) clearly in support of the proposition that the construction of a release in a situation of federally-created rights is to be governed by federal law. In that case, the question of the validity of a release granted to a carrier by an injured employee in an action under the Federal Employers' Liability Act was held a matter of federal rather than state law. The Court stated:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." (342 U.S. at 361.)

We find the Supreme Court's position in *Dice* compelling reason to treat the question of the effect of a general release under the antitrust laws as a matter of federal concern. State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory scheme of the antitrust laws. We affirm the lower court's determination that a federal rule should apply.[4]

II. *Effect of general releases under federal law.*

The determination that federal law governs the effect of a general release in an antitrust case does not, unfortunately, result in a speedy resolution of the controlling legal question which confronts us on this appeal. We must face the task of deciding what that federal law is.

From our reading of the briefs before us as well as the case law that has either directly or tangentially treated the issue presently at bar, we find three possible rules of law which might conceivably be applied to the question of what effect should be given to a general release of one of several joint tort-feasors. These three positions can be stated as follows:

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[4]Cf., note, 63 Mich.L.Rev. 1282, 1284 (1965).

(1) A release given one joint tort-feasor necessarily releases all others even though it expressly reserves rights against them. This is generally referred to as the common law rule.

(2) A release of one tort-feasor does not release other joint tort-feasors unless the release expressly so provides.[5]

(3) A release of one tort-feasor releases all others jointly liable unless the release expressly reserves rights against joint tort-feasors.

The district court, in making its choice of which rule of law to follow, determined that the federal courts which had adhered either to rule "1" or rule "3" had done so adhering to the status of the law as expressed in the Restatement of Torts. Rule "1" embodies the provision of the old common law rule, and Rule "3" voices the position of section 885(1) of the Restatement. The district court concluded that neither of these rules was suitable in the setting of a private treble-damage action under the anti-trust laws. For this reason, the district court took it upon itself to fashion its own body of appropriate federal law. It adopted and applied the position spelled out in Rule "2" above, permitting a release of joint tort-feasors only where expressly provided in the release instrument. We think that in fashioning this body of law the district court has exceeded the bounds of judicial authority and has entered the province of legislative concern. We feel that in the absence of legislative invitation to the courts to fashion a body of federal law and in the absence of a state of law so ambiguous or conflicting that the courts are compelled to fashion a body of law, it is unwise for a court to make legislative judgments usually left to the public's elected representatives.

The selection process exercised by the district court in the present case resulted in the adoption of a rule which is embodied in section 4 of the proposed Uniform Contribution Among Tort-feasors Act. This statutory provision provides as follows:

> "A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

[5]Cf., California Code of Civ. Proc. § 877.

We will not pass judgment on the desirability of this proposed legislation. Such a critical analysis is, in our view, not a proper activity for a judicial body. Rather, we merely note in passing that this proposed legislation has not as yet been adopted by a majority of state jurisdictions,[6] and has not received congressional approval. Given the fact that Congress has not enacted the UCATA rule, and given what we deem to be the clear indications of what the status of the federal law is today on the question of the effect of a general release on joint tort-feasors, we find the district court's use of the proposed UCATA rule unsupportable.

It is important to note that the impression appellees wish to convey of the obsolescence of the position urged by appellants is inaccurate. At no time have appellants urged that we revert to the old common law rule by releasing joint tort-feasors regardless of contrary expressions of intent in the terms of the general release. The authorities have recognized the outmoded nature of this rule, and their recognition has been expressly embodied in the most recent Restatement of Torts (§ 885). Thus the position expressed by the Restatement and the vast majority of the *recent* case law is that a release of one tort-feasor need

[6]The 1939 version of the Uniform Contribution Among Tortfeasors Act which the district court referred to in its opinion was adopted with various modifications by Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota. (9 Uniform Laws Annotated 230, 242 (1957).)

In 1955 the National Conference of Commissioners on Uniform State Laws promulgated a new version of the UCATA in order to reconcile variations that developed in the statutes of the states which had adopted the 1939 act. Section 4 of the 1955 version provides that the release of one joint tortfeasor will have the same effect as that provided for in the 1939 version. The 1955 version has been adopted in Massachusetts and North Dakota. (9 Uniform Laws Annotated, Supp. 105 (1964).)

Other states have acts providing for contribution among joint tort-feasors not patterned on the Uniform Act. Among those which include release provisions similar to the UCATA are the acts of California, Michigan and Florida.

not release all others jointly liable *if* the release expressly reserves rights against joint tort-feasors.

The case most nearly on all fours with the present is *Dura Electric Lamp Co. v. Westinghouse Electric Corp.* 249 F.2d 5 (3d Cir. 1957). In that antitrust action, plaintiffs had given one defendant a general release without reserving any rights against others. Dura's president swore by affidavit that it was never his intention to release parties not signatory to the release. The court, however, held that appellant was bound by the legal effect of the words used, and that the release of one coconspirator had uniformly been treated as releasing all coconspirators unless the release embodied a contrary expression of intent. Numerous other trial courts have reinforced the proposition that the present Restatement position is an accurate expression of the current status of the law of general releases. See, *e.g., Combined Bronx Amusements v. Warner Bros. Pictures,* 132 F.Supp. 921 (S.D.N.Y. 1955); *Rector v. Warner Bros. Pictures,* 102 F.Supp. 263 (S.D. Cal. 1952); *Michael Rose Productions, Inc. v. Loew's Inc.,* 141 F.Supp. 257 (S.D.N.Y. 1956).

Nor do we find the Restatement position to be so unsupportable in reason as appellees would have us believe. The Restatement rule does not prevent an injured party from reserving rights against one or more joint tort-feasors while releasing others. It merely requires that he announce his intent, and express that reservation in the release agreement. Such a rule has the substantial advantages of eliminating disputes as to the intended scope of the release. It discourages chicanery in the negotiation of the release. We find it difficult to believe that the incorporation in a release of a clear statement of its scope and intent will place too heavy a burden on counsel charged with the responsibility of drafting the instrument.

Appellees' citation of cases in support of its position blurs the precise issue before us. The cases are advanced for the proposition that the releasor's intent is the determinative factor in establishing the effect of a general release on the liability of joint tort-feasors. *Eagle Lion Films v. Loew's Inc.,* 219 F.2d 196 (2d Cir. 1955), aff'd 358 U.S. 100 (1958); *Vines v. General Outdoor Advertising Co.,* 171 F.2d 487 (2d Cir. 1948). These cases, however, did not deal with the question of what parties were

released by a general release of one joint tort-feasor. They were, rather, principally concerned with interpretation of an ambiguous general release to determine what claims were and what claims were not included within the scope of the release. In such a situation it is of course proper and necessary to ascertain the intent of the releasor. The present case does not involve that problem. As expressly found by the district court, "the August release includes in its coverage the claims in the Winchester case." (Clerk's Tr. 467G.) The nature of the claims covered by the general release is thus not in issue before us. We are concerned only with the effect of the general release on other joint tort-feasors, the question precisely treated in the *Dura* case, *supra,* and in section 885 of the Restatement of Torts.

Appellees further distort the issue by citing as authority for their position cases in which an *express* reservation of rights against other joint tort-feasors was evident in the release instrument. Appellees juxtapose the holdings in these cases with the old Restatement rule, and urge that we cannot blindly adhere to the traditional position. In so urging, however, appellees ignore the fact that appellants do not adhere to the old common law rule that a general release automatically absolves all joint tort-feasors regardless of a contrary expression of intent. Appellants rather advance what apparently is the modern majority rule that joint tort-feasors are released *unless* an express contrary intention is demonstrated. Thus, as noted by appellees, the Supreme Court opinion in *Aro Mfg. Co. v. Convertible Top Replacement Co.,* 377 U.S. 476 (1964), does repudiate the old rule, but, in doing so, it cites with approval the current Restatement position, a factor completely ignored by appellees in their reliance on the *Aro* case. The Court stated:

> "It is true that a contributory infringer is a species of joint tort-feasor . . . It is also true that under the old common-law rule, a release given to one joint tort-feasor necessarily released another, even though it expressly stated it would have no such effect. See Prosser, Torts (2d ed 1955), at 243-244. Under this rule Aro's argument on this point would prevail, since the agreement did release Ford's purchasers for their infringing use of the top-structures before the agreement date, and that was the use to which Aro contributed. See *Schiff v. Hammond Clock Co.,* 69 F.2d 742, 746

(CA 7th Cir. 1934), reversed for dismissal as moot, 239 U.S. 529. But the rule is not applicable. Even in the area of nonpatent torts, it has been repudiated by statute or decision in many if not most states, see Prosser, *supra*, at 245, and by the overwhelming weight of scholarly authority. *E.g.*, American Law Institute, Restatement of Torts (1939), § 885(1) and Comments b-d." (377 U.S. at 500-01).

In light of the status of the law today, therefore, we are compelled to reject the district court's attempt to employ legislation not yet enacted by the Congress. We hold, consistent with the majority of case law, and the Restatement position, that appellees could have reserved rights against other joint tort-feasors even while releasing Fox West Coast, but that appellees, with the advice of antitrust counsel, failed to do so. The June release did expressly reserve rights against United Artists, but the August release incorporated no express reservations of any kind. We can conclude that this was not happenstance. In the absence of such an express reservation, all joint tort-feasors are released of liability for the claims for which Fox West Coast was released on August 13, 1959.

The order of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

Appendix B

In the United States District Court for the Northern District of California Southern Division

No. 39,632

Winchester Drive-In Theatre, Inc., et al.,
Plaintiffs,

vs.

Twentieth Century-Fox Film Company, et al.,
Defendants.

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ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Zirpoli, District Judge.

This is an antitrust action involving the distribution practices of several motion picture distributors in the northern California area. Plaintiffs are several corporations controlled by Raymond J. Syufy and Syufy Enterprises (herinafter occasionally referred to as "Syufy"), which own and operate drive-in theatres in northern California. The defendants Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, Metro-Goldwyn-Mayer, Inc. and Buena Vista Film Distribution Co., Inc. are distributors of motion pictures. Defendants Blumenfeld Enterprises, Inc. and Fox West Coast Theatres Corporation (not a party to this motion) are exhibitors that own and operate indoor theatres. Plaintiffs allege in their complaint that defendants conspired in violation of the antitrust laws to deprive plaintiffs of the opportunity to compete with indoor theatres for the exhibition of first-run motion pictures.

Defendants moved pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for partial summary judgment on all claims for damages arising from conduct of the defendants prior to August 13, 1959. Defendants contend that because of the general rule that a release of one tortfeasor releases all joint tortfeasors, the "General Release" in favor of Fox released the moving defendants from all claims arising prior to August 13, 1959.

The history of this litigation is complicated and need not be set out in full here. The following factual background is sufficient for purposes of this motion: On November 8, 1958 some of the Syufy corporations filed an antitrust action in this district against Fox West Coast Theatres, Inc. and United Artists Theatre Circuit, Inc. (Civil Action No. 37792). This case will hereinafter be referred to as the "Rancho case", as distinguished from the present case, which will occasionally be referred to as the "Winchester case". On May 11, 1959 the plaintiffs in the Rancho case executed with Fox a document entitled "Agreement for Dismissal of Action and General Release", which provided in pertinent part as follows:

> "Whereas, there is pending in the United States District Court for the Northern District of California that certain action filed by Rancho Drive In Theatre Corp., against Fox and others; and
>
> "Whereas, various disputes have from time to time arisen between some or all of the Releasors and the Releasees described in Exhibit 'B' hereto annexed including Fox and Syufy; and
>
> "Whereas, by agreement executed concurrently herewith Fox has entered into an agreement to sell to the nominee of Syufy certain assets of Fox; and
>
> "Whereas, the parties hereto have agreed to compose, [sic] settle and discharge all pending litigation and disputes among them or some of them; and
>
> "Whereas, all of said Releasors are or have been controlled, directly or indirectly, by Raymond J. Syufy, and said Releasees are or have been directly or indirectly affiliated with Fox;
>
> "Now, Therefore, It is Agreed by and between the parties hereto as follows:

"1. Syufy agrees to procure and deliver to Fox forthwith the following documents:

"(a) Three copies of a stipulation in form as attached hereto as Exhibit 'A' executed by duly authorized counsel for Rancho Drive In Theatre Corp., a California corporation, plaintiff in that certain action pending in the United States District Court for the Northern District of California, Southern Division, entitled *'Rancho Drive In Theatre Corp., Plaintiff v. Fox West Coast Theatres Corp. and United Artists Theatre Circuit, Inc., Defendants,'* being No. 37792 in the files of said court.

"(b) Three copies of a release in form as attached hereto as Exhibit 'B' duly executed by each and every Releasor named therein."

On June 8, 1959 Syufy executed the release referred to in the above quotation, and this release was limited by its terms to the Rancho case.[1] Thereafter, on August 13, 1959 Syufy executed another release in favor of Fox, which is the "General Release" claimed by defendants to discharge them from liability in the present motion. This latter release is very general and provides that:

"For and in consideration of the sum of $3,200.00 paid by Releasees to Raymond Syufy (who is hereby

[1]This release provides in pertinent part as follows:

"Without in any way limiting the generality of the foregoing general release, it is understood that the same specifically includes any and all claims which have been asserted and which might be asserted in that certain action entitled *'Rancho Drive In Theatre Corp., Plaintiff, v. Fox West Coast Theatres Corp. and United Artists Theatre Circuit, Inc., Defendants'*, pending in the United States District Court for the Northern District of California, Southern Division, No. 37792 in the files of said court; provided, however, that this release shall not cover any claims of Releasors against United Artists Theatre Circuit, Inc., a defendant in said action."

> authorized by each Releasor to receive said sum on his, her, and its behalf) Releasors, and each of them release and discharge Releasees, and each of them, from any and all claims, demands or causes of action, known or unknown, against Releasees, or any of them, which Releasors, or any of them, now own or hold, have at any time heretofore owned or held, or may at any time hereafter own or hold, by reason of any matter, cause or thing whatsoever done, omitted or suffered to be done prior to the date of this instrument."

Over a year after this release was executed, Syufy filed on December 28, 1960 the present Winchester case.

On February 6, 1963 certain defendants in the Winchester case filed the first motion for partial summary judgment on the ground that the August release discharged them from liability as joint tortfeasors for damages resulting from their conduct prior to August 13, 1959. This Court in its order of March 6, 1963 denied this motion on the ground that it could not find as a matter of law that the August release discharged the defendants in the Winchester case. The Court ruled that there was a question of fact as to whether the May and June documents, which were limited by their terms to the Rancho case, should be read together with the August release as "one document".

Since the Court's prior ruling, the attorneys for plaintiffs and Fox filed a written stipulation executed by them on April 22, 1964 in the Winchester case as follows:

> "It Is Hereby Stipulated by and between all of the plaintiffs herein and defendant Fox West Coast Theatres Corporation, by and through their respec-

tive counsel, that plaintiffs are seeking no damages from defendant Fox West Coast Theatres Corporation for the period prior to August 13, 1959, said date being the date of a General Release executed by plaintiffs and on their behalf to said defendant, and attached as Exhibit B to the answer of said defendant on file herein."

Also on April 22, 1964 counsel for plaintiffs orally stipulated with counsel for defendants other than Fox that the August release released any and all claims against Fox for the period prior to August 13, 1959;[2] however, counsel also added the following qualification to the oral stipulation:

"Mr. Littman: As it pertains to all the corporations signatory to the release, is that the stipulation?

"Mr. Bertain: Yes. Unless I am missing something, Your Honor, which I will have to check out, this is my understanding of the law and of the release.

"The Court: All right.

"Mr. Bertain: But I would not want to be prejudiced in case I make a mistake on it.

"The Court: Well, that is your present stipulation, anyway.

"Mr. Bertain: Right."

Counsel for Syufy has asked leave of court to correct the oral stipulation to provide that the August release be

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[2] "Mr. Littman: Is that so stipulated?
"Mr. Bertain: That is so stipulated.
"Mr. Abala: That is my understanding.
"The Court: All right, then it may be so stipulated. Stipulated, in other words, that this was intended as a complete release as far as Fox West Coast Theatres Corporation is concerned for the period prior to August 13, 1959.
"Mr. Bertain: Right."

applied only to claims by the Rancho Drive-In Theatre (one of the plaintiff corporations). The Court cannot correct the stipulation because a stipulation requires assent of both parties, and counsel for defendants have not assented to the new terms; however, in light of the qualification to the stipulation, the Court must relieve counsel of the oral stipulation's binding effect. Of course, the Court's removal of the oral stipulation does not alter the binding effect of the written stipulation.

I. *The effect of the prior order of March 6, 1963 on the present motion for partial summary judgment.*

The prior order is not the "law of the case", insofar as the present motion is concerned, for two reasons: First, upon re-examination of the prior order in light of the record as of March 6, 1963, the Court finds that it was in error when it ruled that there was a question of fact as to whether the May and June documents should be read together with the August release as "one document", and therefore this ruling of its prior order is modified in the manner hereinafter stated. Second, the change in the record of March 6, 1963 by the written stipulation of April 22, 1964 removes any question of fact as to whether the August release was intended to apply solely to the Rancho case.

With respect to the first reason, the basis of the prior ruling, as noted above, was that the Court found a question of fact as to whether the August release could be read as "one instrument" with the earlier May and June documents. The August release does not refer to the May and June documents or the Rancho case; nor do the May

and June documents refer to the August release. Because the June release releases Fox from all liability in the Rancho case, the August release is meaningless unless it is construed to apply to claims other than the Rancho case. Therefore, the March 6, 1963 order is modified insofar as it holds that there is a factual issue as to whether the August release applies solely to the Rancho case.

With respect to the second and alternative reason, the written stipulation in the instant case of August 22, 1964 proves that the August release was not intended to apply solely to the Rancho case. Moreover, because the stipulation was made in the present case, the record is clear that the August release was intended to include at least claims arising from the alleged conspiracy in the Winchester case.[3] The present record is such that there is no factual issue as to whether the August release can be read as "one instrument" with the May and June documents. The Court finds that the August release was not intended to apply only to the Rancho case; and the Court further finds that the August release includes in its coverage the claims in the Winchester case.

II. *State versus federal law.*

The reported cases do not agree on whether state or federal law governs the effect of a release in a federal antitrust case. In *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F. 2d 5 (3rd Cir. 1957), the Court stated that it was not sure whether state or fed-

[3]The language of the August release may be broad enough to apply to claims other than the Winchester case. But the Court does not now rule to that effect, since such a ruling would be unnecessary to its present decision.

eral law applied, and it held it was unnecessary to resolve the question because the state and federal law were identical. In *Solar Electric Corp. v. General Electric Co.*, 156 F. Supp. 51 (D.C. W.D. Penn. 1957), the court held that state law applies. In *Taxin v. Food Fair Stores Inc.*, 197 F. Supp. 827 (E.D. Pa. 1960), and in *Hilton v. Triangle Publications, Inc.*, 198 F. Supp. 638, it was held without discussion that federal law applies. The Supreme Court has never ruled on the question in an antitrust case; however, the court has held in the leading case of *Dice v. Akron C.&Y. R. Co.*, 342 U.S. 359 (1952), that federal law governs the construction of a release in an FELA case because federal rights could be defeated if the states had the final say as to permissible defenses to the Federal Employers' Liability Act. See also *Garrett v. Moore-McCormack*, 317 U.S. 239 (1942).

If the federal courts apply state law, there will be a lack of uniformity of result because state law varies considerably on the question of the effect of a general release of one joint tortfeasor on the remaining tortfeasors. The majority rule is that a general release of one joint tortfeasor releases the others. Prosser, Handbook on Torts, § 46, p. 243 (2d ed.); Annotation, 73 A.L.R. 2d 390, 410, § 4. However, the majority rule is subject to many variations. Many courts hold that an express reservation of a claim against a non-signatory tortfeasor is ineffective to prevent a discharge, even though the intent of the parties is clear. See for example, 73 A.L.R. 2d 390, 413, § 5. However, some courts have attempted to mitigate the harshness of the common law rule by holding that where the general release contains an express reservation of claims

against the remaining tortfeasors, they are not discharged. 73 A.L.R. 2d 390, 414, § 5. This latter rule is adopted by the Restatement of Torts in § 885 (1). A third approach expressed in *Natrona Power Co. v. Clark*, 31 Wyo. 284, 225 P. 586 (1924), is that a release containing an express reservation will be construed as a covenant not to sue. Some courts with a view to limiting the scope of the common law rule have held the majority rule inapplicable where the tortfeasors were regarded as independent, rather than joint or concurrent tortfeasors, *Ash v. Mortenson*, 24 C. 2d 654, 150 P. 2d 876 (1944); while other courts have held that the discharge cannot be avoided by making the distinction between independent and joint tortfeasors. *Rushford v. United States*, 92 F. Supp. 874 (applying New York law). The harshness of the majority rule is commonly avoided by using the artificial drafting device of a "covenant not to sue", which theoretically "preserves" the cause of action.

The growing minority rule is that the legal effect of a release on a stranger thereto should be determined by the intent of the parties to the release and the extent of compensation paid to the releasor, rather than upon outmoded concepts of ancient times. *Breen v. Peck*, 78 N.J. 351, 146 A. 2d 665 (1958). See also 73 A.L.R. 2d 390, 422, § 10; *Friday v. United States*, 239 F. 2d 701, 705 (9 Cir. 1957).

In recent years some states have enacted statutes in this area of the law. Again there is a diversity in the statutory approach. One approach requires an express reservation of claims against non-signatory tortfeasors to prevent their discharge. Article 2203, Civil Code of Lou-

isiana; Uniform Joint Obligations Act, § 4. On the other hand, other statutes provide that a release never discharges a non-signatory tortfeasor unless expressly so provided. Fla. Stat., § 54.28; Michigan Compiled Laws, 691.562; California Code of Civil Procedure, § 877; Uniform Contribution Among Joint Tortfeasors Act, § 4.

Where uniformity of result is essential to effectuate the purposes of a federal act, federal common law governs all matters which are ancillary to but not covered by the federal statute. *Dice v. Akron, C.&Y. R. Co., supra; Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943). In the antitrust field a great number of cases involve business enterprises located in more than one state. Most antitrust cases are settled before reaching trial. The application of state law could result in a variety of results, depending on the number of states involved and the uncertainty of modern choice of law rules. The problem would be aggravated in nationwide antitrust litigation, such as the recent electrical equipment cases in which over 1800 lawsuits are pending in more than 30 districts. The Congressional policy of private antitrust enforcement cannot be subjected to the artificial distinction between whether a particular document is a covenant not to sue in one state and a general release in another. In light of the variety of state law on the subject and the uncertainty of modern conflict of laws rules, the federal courts would be laying a giant trap for the unwary if they were to apply state law in this field. Therefore, the Court concludes that federal rather than state law governs the effect of a general release on non-signatory joint tortfeasors in an action under the federal antitrust laws. Only thus can

federal antitrust laws be given that uniform application throughout the country essential to effectuate their purpose.

III. *The federal law.*

The Court agrees with the observation expressed in *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827 at 831, that:

> "Having determined that federal law would control . . . we searched for federal law on the subject and were unable to find any cases directly in point."

The defendants contend that the federal law is that a general release of one tortfeasor without any contrary manifestation of intent in the instrument releases all other joint tortfeasors. For this proposition, defendants rely on *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, (3rd Cir. 1957) 249 F. 2d 5; *Combined Bronx Amusements v. Warner Bros. Pictures*, (S.D. N.Y. 1955), 132 F. Supp. 921; *Matland v. United States*, (3rd Cir. 1961) 285 F. 2d 752, 755; *Solar Electric Corp. v. General Electric Co.*, (W.D. Pa. 1957) 156 F. Supp. 51, 60; *Duffy Theatres v. Griffith Consol. Theatres*, (10 Cir. 1953) 208 F. 2d 316, 323-324; *Taxin v. Food Fair Stores, Inc.*, (E.D. Pa. 1960) 197 F. Supp. 827; and Restatement, Torts, § 885(1). A reading of these cases shows that they simply adopt without discussion the general state common law or the Restatement. None of them attempt to state or develop a separate federal rule or consider the special problems created by the multistate character of antitrust litigation. Perhaps the only case which for strictly federal purposes has actually developed a rule governing the effect of gen-

eral releases in *McKenna v. Austin,* 134 F. 2d 659, wherein the rule as applied for the District of Columbia appears at page 664 as follows:

> "In summary, there is no support for the rule of unitary discharge in the notion of entirety of obligation among joint tortfeasors. There is foundation in singleness of the injury, when complete indemnity has been made. We adhere to the rule in that circumstance. We repudiate it in others. Whether or not the settlement amounts to full reparation is to be determined, not merely from the fact of settlement, but as the facts of the particular situation dictate. Partial satisfaction taken in compromise and release of liability of one or some of the wrongdoers does not discharge the others. In the present case, the agreement with Independent expressly reserved the plaintiff's rights against the defendant. He therefore was not discharged. *It is not material whether the instrument be considered a release or a covenant not to sue.*" (Emphasis added.)

Stella v. Kaiser, (2d Cir. 1955) 221 F. 2d 115, held that the doctrine of *McKenna v. Austin* is the federal rule, but *Stella v. Kaiser* is not helpful here because the language of the release in that case included an express reference to the nonsignatory tortfeasor and the release in question here contains no such reference.

The general state rule that a release discharges the remaining tortfeasors irrespective of the intent of the parties and the Restatement rule that only a clear expression of intent in the instrument will prevent a discharge are inadequate rules for federal antitrust cases. Both rules ignore the fact that the plaintiff usually intends to release

only the signatory tortfeasor. Although the Restatement rule is an improvement on the harsher general rule, it is still a trap for the unwary and today appears to be based solely on a metaphysical notion of the early common law and without consideration of the modern realities of business litigation, particularly in the antitrust field.

In light of the lack of a well-developed federal rule in the antitrust field and in light of the inadequacy of the general common law, this Court has a duty to fashion a rule which will further the federal policy of relying heavily on private, rather than public, enforcement of the antitrust laws. The creative responsibility of this Court is similar to the responsibility imposed by the Supreme Court in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1956), on the lower federal courts to fashion a federal common law of arbitration within the policy of our national labor laws. In fashioning a federal rule on releases in the antitrust field, the federal courts must keep in mind the realities of the multistate character of much of the present private antitrust litigation. This Court would be remiss in its duty if it simply perpetuated an artificial common law trap for the unwary, which remains in our law only because of the force of history.

The better rule for the antitrust field is embodied in Section 4 of the Uniform Contribution Among Joint Tortfeasors Act as follows:

> "A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid

> for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

This rule has the following advantages: it is more in line with the normal intention of the parties to a release; it does not create a trap for the unwary, particularly those who practice in states which have adopted the statutory or minority rules; and it prevents double recovery without resorting to artificial concepts because the amount received in settlement is deducted from the total liability. The problem of determining the value of non-monetary consideration paid for the release is no more difficult than the commonplace difficulties encountered in determining damages in any antitrust case. The problem can be handled by a special interrogatory to the jury, as was done in this district in *Bal Theatre Corp. v. Paramount Film Distributing Corp.*, 206 F. Supp. 708 (1962).

Applying the federal rule as developed by this Court to the facts of the present case, the motion for partial summary judgment must be denied. The terms of the August release are quite general, but they do not include a provision showing an intent to discharge any other possible tortfeasors. Therefore, the "General Release" of August 13, 1959 can apply only to Fox West Coast Theatres Corporation.

It is Therefore Ordered that defendants' motion for partial summary judgment is denied.

CERTIFICATE OF PROBABLE CAUSE

The question of what rule the federal courts should apply to govern the effect of a general release in a federal antitrust case presents a question to which there is no clear answer in the authorities. In the opinion of this Court, this order involves controlling questions of law for which there is substantial ground for differences of opinion, as noted in the Court's discussion of the authorities cited in this opinion. In that connection see also *Suckow Borax Mines Consol. v. Borax Consolidated,* 185 F. 2d 196, at 207. Therefore, pursuant to the provisions of 28 U.S.C. § 1292(b), an immediate appeal from the order will materially advance the ultimate termination of the litigation in this and other cases pending in this court.

Dated: June 29, 1964.

Alfonso J. Zirpoli
United States District Judge

Filed July 1, 1964.
Clerk, U. S. District Court, San Francisco.

United States Court of Appeals
for the Ninth Circuit

Twentieth Century-Fox Film Corp., et al., Appellants, vs. Winchester Drive-In Theatre, Inc., et al., Appellees.	No. 19,400

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed with costs in favor of the appellants and against the appellees and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the views herein express in the opinion of this Court.

It Is Further Ordered And Adjudged by this Court that the appellants recover against the appellees for their costs expended and have execution therefor.

Costs:	Docket fee	$ 25.00
	Cost of reproduction of record	92.07
	Total Costs	$117.07

Filed and entered October 22, 1965.

United States Court of Appeals
for the Ninth Circuit

Blumenfeld Enterprises, Inc., Appellant, vs. Winchester Drive-In Theatre, Inc., et al., Appellees.	No. 19,402

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed with costs in favor of the appellant and against the appellees and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the views herein express in the opinion of this Court.

It Is Further Ordered And Adjudged by this Court that the appellant recover against the appellees for its costs expended and have execution therefor.

Costs: Docket fee	$ 25.00
Total Costs	$ 25.00

Filed and entered October 22, 1965.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 809

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
BUENA VISTA DISTRIBUTION CO., INC.,
METRO-GOLDWYN-MAYER, INC., and
PARAMOUNT FILM DISTRIBUTING CORPORATION,
BLUMENFELD ENTERPRISES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WINCHESTER DRIVE-IN THEATRE, INC.,
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PARAMOUNT FILM DISTRIBUTING CORPORATION,
BLUMENFELD ENTERPRISES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important question of Federal law nor is the decision below in conflict with that of any other circuit.

The district court purported to adopt as a new rule to be applicable in all Federal antitrust cases a portion of section 4 of the 1939 version of the proposed Uniform Contribution Among Tort-Feasors Act to the effect that a general release does not discharge other tort-feasors unless the release expressly provides for their discharge. The court of appeals rejected "the district court's attempt to employ legislation not yet enacted by the Congress" (Appx. A to Pet., p. x); it applied to releases in antitrust cases the rule which is applicable to all releases and which is "consistent with the majority of case law, and the Restatement position" (Appx. A to Pet., p. x).

QUESTION PRESENTED

The question stated by petitioners (Pet., p. 2) is not accurate.

The question presented is the correctness of the rejection by the court of appeals of "the district court's attempt to employ legislation not yet enacted by the Congress" (Appx. A to Pet., p. x) and the holding of the court of appeals

> "* * * that appellees [petitioners] could have reserved rights against other joint tort-feasors * * * but that appellees, with the advice of antitrust counsel, failed to do so. * * * In the absence of such an

express reservation, all joint tort-feasors are released of liability * * *'" (Appx. A to Pet., p. x).

STATEMENT OF THE CASE

Petitioners' statement of the case fails to state all of the consideration for the release which, according to petitioners' president, amounted to $103,200 (R. 298, lines 1-19).[1]

Petitioners' statement of the decisions by the courts below is not complete. The district court attempted to create a new rule of Federal law concerning the effect of releases in Federal antitrust actions (R. 267L). It adopted for such rule a portion of the 1939 version of the proposed Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Annotated (1957) 230, 242 (R. 267M).

The Court of Appeals for the Ninth Circuit, on an appeal taken pursuant to section 1292(b) of Title 28 of the United States Code, reversed. It held:

> "In light of the status of the law today, therefore, we are compelled to reject the district court's attempt to employ legislation not yet enacted by the Congress. We hold, consistent with the majority of case law, and the Restatement position, that appellees could have reserved rights against other joint tort-feasors even while releasing Fox West Coast, but that appellees, with the advice of antitrust coun-

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[1] In addition to the $3,200 referred to in the petition (Pet., p. 4), the releasors received consideration worth $100,000 by being permitted to buy for $25,000 a theatre valued at $125,000 (R. 298).

sel, failed to do so. The June release did expressly reserve rights against United Artists, but the August release [here in issue] incorporated no express reservations of any kind'' (Appx. A to Pet., p. x).

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT COURT OR OF THIS COURT.

In rejecting the trial court's ruling, the court of appeals relied upon subsection 1 of section 885 of the Restatement of Torts and the following cases:

Dura Electric Lamp Co. v. Westinghouse Electric Corp. (3 Cir. 1957) 249 F.2d 5, 6-7;

Combined Bronx Amusements v. Warner Bros. Pictures (S.D.N.Y. 1955) 132 F.Supp. 921, 922;

Rohlfing v. Cat's Paw Rubber Co. (N.D.Ill. 1954) 17 F.R.D. 426, 430;

Michael Rose Productions v. Loew's Incorporated (S.D.N.Y. 1956) 141 F.Supp. 257, 261.

Petitioners point to no decision in any Federal court which conflicts with the decision of the Court of Appeals for the Ninth Circuit and we know of none. Petitioners, however, erroneously assert (Pet., pp. 9-10) that the decision below is inconsistent with this Court's opinion in *Aro Mfg. Co. v. Convertible Top Co.* (1964) 377 U.S. 476.

This Court in the *Aro* case held that alleged tortfeasors, were not discharged by a release which expressly reserved rights against them (377 U.S. 500-501), but also held that payment by the releasee diminishes the amount

recoverable from the alleged tort-feasors against whom rights are reserved (377 U.S. 502-503, 512-513). Neither holding conflicts with the opinion of the court of appeals which followed the uniform rule applied by the Federal courts.

The court of appeals relied upon the *Aro* opinion for its rejection of the old rule that a general release discharges all joint tort-feasors notwithstanding an express reservation of rights against joint tort-feasors (377 U.S. 501). The court of appeals pointed out that, contrary to an assertion by petitioners, this Court in the *Aro* case had *not* disapproved the Restatement position under which a general release discharges all tort-feasors except to the extent that rights are reserved in the release (Appx. A to Pet., p. ix).[2]

For the first time in this case petitioners assert that this Court's opinion in the *Aro* case, when read together with the Restatement position, creates an "incongruity" in the law (Pet., pp. 9-10). The portion of the *Aro* opinion *now* relied upon by petitioners (377 U.S. 502-503, 512-513) does not relate to the release of joint tort-feasors; it relates only to the amount of damages which may be recovered from those joint tort-feasors not released. This Court held, in accordance with subsection 3 of section 885 of the Restatement of Torts, that payment made by one tort-feasor diminishes the amount recoverable from other

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[2]Petitioners now note that this Court in the *Aro* case cited Professor Prosser and compare its three citations of Prosser to only one citation of the Restatement (Pet., p. 14). But both the Restatement and Prosser were cited by this Court for one point only: disapproval of the rule that an express reservation in a release has no effect (377 U.S. 500-501).

tort-feasors and that a reservation of rights is immaterial if in fact full compensation has been received.[3]

This Court in the *Aro* opinion did not find any inconsistency or incongruity in the rules embodied in subsections 1 and 3 of section 885 of the Restatement of Torts. Petitioners have cited no authority which discerns any such incongruity and we know of none. The rules embodied in the two subsections are wholly consistent and taken together operate (a) to discharge a plaintiff's claim against an alleged tort-feasor in the event a general release is given one joint tort-feasor and no claims against the other tort-feasors are reserved (subsection 1), and (b) to diminish the amount that a plaintiff can recover from an alleged tort-feasor by the amount of compensation that has in fact been received from a joint tort-feasor (subsection 3).[4]

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[3]Subsection 3 of section 885 of the Restatement of Torts provides:

> "Payments made by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment; the extent of the diminution is the amount of the payment made, or a greater amount if so agreed between the payor and the injured person."

[4]As this Court pointed out in the portion of the *Aro* case quoted by petitioners (Pet., p. 9), for the purpose of determining the amount of diminution in plaintiff's recovery "the adequacy of compensation must always be a question of fact" (377 U.S. 513). This is in accord with the established principle of contract law that a written recital of consideration is not conclusive proof of the amount actually paid (Rest. Contracts, sec. 82).

II. THE COURT OF APPEALS CORRECTLY REFUSED TO AFFIRM THE RULE ADOPTED BY THE DISTRICT COURT, AND PETITIONERS HAVE NOT PRESENTED ANY REASON WHY THIS DETERMINATION SHOULD BE DISTURBED.

Petitioners, tacitly agreeing that the court of appeals correctly rejected the rule adopted by the district court, do not attempt to support that rule. Instead, they propose a new rule that the effect of a release on an alleged joint tort-feasor should be determined by an examination into the unexpressed and subjective intent of the releasor to reserve or not to reserve claims against joint tort-feasors (Pet., p. 16)—a rule which apparently has not been adopted by any Federal court or by any legislature and which was not presented to the court below for its consideration.[5] They urge this Court to adopt their proposed rule on the grounds that (1) it would remove the purported "incongruity" created by the *Aro* decision (Pet., pp. 9-10), and (2) the decision of the court of appeals ignored "modern day commercial reality" (Pet., pp. 10-13). We have previously shown that there is no incon-

[5]The court of appeals, from reading the briefs before it, found "three possible rules of law which might conceivably be applied to the question of what effect should be given to a general release to one of several joint tort-feasors" (Appx. A to Pet., p. v). The rule now advanced by petitioners is entirely different from any rules set forth in the opinion (Appx. A to Pet., p. vi; see also Pet., p. 14). It was at most obliquely raised by petitioners' citation of cases from the Second Circuit which dealt with what claims—rather than which parties—were released by a general release of one tort-feasor (Appx. A to Pet., pp. viii-ix). Petitioners did not petition for a rehearing. Nor did they otherwise comply with the requirement that the position now taken in their petition be pressed upon the attention of the court of appeals.

Jordan Mining Co. v. Société Des Mines (1896) 164 U.S. 261, 264-265;
Duignan v. United States (1927) 274 U.S. 195, 200;
Husty v. United States (1931) 282 U.S. 694, 701-702.

sistency or incongruity between the *Aro* decision and the decision of the court of appeals (supra, pp. 4-6).

The assertion that the court of appeals has ignored "commercial reality" finds no support in the record of this case or in common experience. There is no basis for petitioners' assertion that antitrust plaintiffs either lack counsel or have inadequate counsel (Pet., p. 12). In this case, petitioners were at all times, including the approval and signing of the release, represented by counsel well versed in antitrust law and Federal procedure (Appx. A to Pet., p. x; cf. *Dura Electric Lamp Co. v. Westinghouse Electric Corp.* (3 Cir. 1957) 249 F.2d 5, 7).

Petitioners hypothesize about "unwary" laymen upon whom "able defense lawyers" will "spring the trap" (Pet., pp. 12-13, 17). But the law already provides relief in cases where a release is obtained as a result of basic mistake, fraud or duress (Rest. Torts, sec. 885, Comment (d), pp. 462-463). There is no allegation of such circumstances in this case. Moreover, the assertion that antitrust plaintiffs are generally at a legal disadvantage to antitrust defendants is simply petitioners' unsupported and undocumented conclusion.[6]

Petitioners' repetition of the district court's speculation about what an antitrust plaintiff "usually intends" (Pet., p. 13) is likewise without factual or other support. On the contrary, it can more fairly be concluded that a plaintiff intends that the release he signs be in accord with

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[6]The suggestion (Pet., pp. 12-13) that counsel for possible antitrust defendants will seek out possible plaintiffs and suggest settlements before actions are brought and before the potential plaintiffs are represented by counsel borders on the absurd.

the established rule that rights against others must be reserved. For example, as the court below pointed out, in the case at bar the releasors first signed a release which reserved rights against defendant United Artists, but later executed a release which contained no express reservations of any kind (Appx. A to Pet., p. x). The court further noted that these actions were taken "with the advice of antitrust counsel" (Appx. A to Pet., p. x). There is, therefore, no basis in the record of this case for speculation regarding intent. And, once more, petitioners present no documentation to support their assertions.

Petitioners also assert that enforcement of the antitrust laws through private action will be "seriously undermined" in the event that this Court fails to adopt the new rule which they propose (Pet., p. 17). But petitioners ignore the most likely result which would follow the adoption of their proposal: They assert that most antitrust actions are settled and seemingly acknowledge the importance of encouraging such settlements (Pet., pp. 11-12). Further, they admit that the decision of the court of appeals will eliminate disputes over the effect of a release (Pet., p. 10). But the rule petitioners now advance would allow the releasor, in every case, to dispute the intended effect of his release. This could only create uncertainty and, therefore, discourage the settlement of antitrust cases.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 4, 1966.

Respectfully submitted,

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In the Supreme Court

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OCTOBER TERM, 1965.

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WINCHESTER DRIVE-IN THEATRE, INC.,
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vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
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Petitioners,

vs.

BLUMENFELD ENTERPRISES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PERMAU-WALSH PRINTING CO., SAN FRANCISCO

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Respondents do not dispute the existence of a clear conflict in the circuits on the fundamental issue of which law, state or federal, governs the validity and effect of a release given in a federal antitrust action 2

II

Petitioners' view that the federal rule should be based upon a factual inquiry was presented to the Court of Appeals and summarily rejected 3

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Simpson v. Union Oil Co. of California, 311 F.2d 764 (9th Cir. 1963), reversed, 377 U.S. 13 (1964) 7

Vines v. General Outdoor Advertising Company, 171 F.2d 486 (2d Cir. 1948) 3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 809

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
BUENA VISTA DISTRIBUTION CO., INC.,
METRO-GOLDWYN-MAYER, INC., and
PARAMOUNT FILM DISTRIBUTING CORPORATION,
Respondents.

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

BLUMENFELD ENTERPRISES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

This reply brief is filed not for the purpose of repeating the points made in the Petition, but to discuss certain points made by respondents in their joint brief in opposition, indicating thereby reasons for granting the writ.

There are four short arguments to be made here. The first is to emphasize the clear conflict in the circuits on the fundamental issue of which law, state or federal, governs the validity and extent of a release given in an antitrust action, a point raised by the Petition but totally ignored in the brief in opposition. The second point is to make clear that the Court of Appeals had the benefit of the case of *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Company, Inc.*, 377 U.S. 476 (1964), and that the Court of Appeals summarily rejected, even as an alternative, a rule based upon factual inquiry. The third argument is that the district court in this case "legislated" no more or less than the Court of Appeals. The final argument points out the fallacy in respondents' contention that the so-called Prosser rule will discourage settlement of cases because of "uncertainty".

I

RESPONDENTS DO NOT DISPUTE THE EXISTENCE OF A CLEAR CONFLICT IN THE CIRCUITS ON THE FUNDAMENTAL ISSUE OF WHICH LAW, STATE OR FEDERAL, GOVERNS THE VALIDITY AND EFFECT OF A RELEASE GIVEN IN A FEDERAL ANTITRUST ACTION.

The Court of Appeals is the first federal appellate court to hold that federal law governs the validity and

effect of a release given in an antitrust action (Appx. A to Pet., pp. iv, v). That holding clearly conflicts with two holdings in the Second Circuit. *Vines v. General Outdoor Advertising Company,* 171 F.2d 486 (2d Cir. 1948); *Eagle Lion Films v. Loew's, Inc.,* 219 F.2d 196 (2d Cir. 1955). The uncertainty generated by these conflicting decisions is compounded by the case upon which respondents principally rely, *Dura Electric Lamp Co. v. Westinghouse Electric Corp.,* 249 F.2d 5 (3rd Cir. 1957) In that case the issue was posed by the Court but left unanswered, owing to the supposed sameness of the federal and state law.

Respondents have ignored this conflict. While petitioners agree with the determination of the Court of Appeals on this limited issue, petitioners are not precluded from pointing out to this Court the potential uncertainty resulting from that decision. In the present state of the law, an appellate court in any but the Second and Ninth Circuits would have good authority for deciding this question either way.

II

PETITIONERS' VIEW THAT THE FEDERAL RULE SHOULD BE BASED UPON A FACTUAL INQUIRY WAS PRESENTED TO THE COURT OF APPEALS AND SUMMARILY REJECTED.

Respondents intimate at page 7 of their brief that the *Aro* case and the Prosser rule were not presented by petitioners for the consideration of the Court of Appeals.[1]

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[1] *Aro* was not decided by this Court until after this proceeding had been briefed, argued and submitted to the District Court.

The *Aro* case covers pages 20 and 21 of petitioners' (there appellees') brief in the Court of Appeals. The case was relied upon heavily by petitioners for the proposition that a factual inquiry into intent and consideration paid for the release should be the basis of the "new" federal rule. The Court of Appeals disposed of *Aro* with a short quotation and a characterization of an "e.g." therein as a citation with approval (Appendix A, pp. ix, x).

Other cases cited by petitioners in the Court of Appeals for the proposition that an analysis of intent and consideration should be the foundation of the federal rule were rejected summarily by the Court of Appeals which "distinguished" the cases on the ground that they dealt with the interpretation of an ambiguous release in which the issue was what claims were, rather than what parties were, covered by the instrument.

Indeed, the Court of Appeals did not even set out the *Aro*-Prosser rule proposed by petitioners as one of the alternative rules from which it could choose (see Appendix A, p. vi).

Thus, the Court of Appeals by adopting a rule which makes the effect of the release depend solely upon the language and not upon realities effectively disregarded this Court's decision in *Aro* that substance, not form, determines the effect of a release upon joint tort-feasors. Hence, the incongruity discussed in the Petition.

III

THE COURT OF APPEALS ACCUSES THE DISTRICT COURT OF JUDICIAL LEGISLATION WHILE IT ITSELF IS LEGISLATING; THE EVOLUTION OF THE LAW TO SUIT CHANGED CIRCUMSTANCES AND NEW PURPOSES IS NOT LEGISLATION IN THE SENSE OF A USURPATION OF THE FUNCTION OF CONGRESS BUT IS A DUTY OF JUDICIAL DECISION MAKING.

The Court of Appeals condemns the efforts of the district court to reconcile the old joint tort-feasor rule with the nation's antitrust policy as an incursion into "the province of legislative concern". (Appendix A, p. vi). The Court of Appeals also condemns a "selection process" which "resulted in the adoption of a rule" which the Court of Appeals would not affirm. But in reversing, the Court of Appeals employed its own "selection process". The Court of Appeals was not bound by dicta of the Third Circuit in the *Dure Electric* case, *supra,* and could have affirmed the district court's rule, which is certainly more consistent with the holding of this Court in *Aro.* Instead, the Court of Appeals rejected any rule which would accommodate the *Aro* holding, and adopted the Restatement rule. Certainly, in terms of "legislating" this is no different from what the district court did.

The critical difference between the district court and the Court of Appeals in their search for a federal rule from among the competing alternatives was in the philosophy with which that search was undertaken. Thus, the district court stated:

> "In light of the lack of a well-developed federal rule in the antitrust field and in light of the inadequacy of

> the general common law, this Court has a duty to fashion a rule which will further the federal policy of relying heavily on private, rather than public, enforcement of the antitrust laws."
>
> (Appendix B, p. xxv).

But the Court of Appeals as its rationale for the "selection" of the Restatement rule said:

> "Such a rule has the substantial advantages of eliminating disputes as to the intended scope of the release. It discourages chicanery in the negotiation of the release."
>
> (Appendix A, p. viii).

In rejecting the district court's selection of a rule which furthered the enforcement of the antitrust laws through private litigation in favor of a rule which thwarts such private enforcement actions, the Court of Appeals is drawn into irreconcilable conflict with the views of this Court and of the Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws". *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Leh v. General Petroleum Corp.*, 86 S.Ct. 203, 207 (1965). The decision of the Court of Appeals, if left unaltered by this Court, will have the effect of dissuading other federal courts from fashioning rules which further the policy of enforcing the antitrust laws through private actions, just as the decisions of this same Court of Appeals in other case would have had such an effect but for this Court's review of those cases.[2]

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[2]See *Klors, Inc. v. Broadway-Hale Stores*, 255 F.2d 214 (9th Cir. 1958), reversed by unanimous Court 359 U.S. 207 (1959);

This difference of philosophy alone we respectfully submit justifies review of this case by this Court before the conflict spreads further.

IV

ANY UNCERTAINTY CONNECTED WITH THE RULE URGED BY PETITIONERS WOULD DISCOURAGE SETTLEMENT OF ANTITRUST CASES ONLY WHERE GUILTY DEFENDANTS PERSIST IN AN ILLEGAL COMBINATION.

Respondents state in their brief at page 9:

> "Further, they [petitioners] admit that the decision of the court of appeals will eliminate disputes over the effect of a release (Pet., p. 10). But the rule which petitioners now advance would allow the releasor, in every case, to dispute the intended effect of his release. This could only create uncertanty and, therefore, discourage the settlement of antitrust cases."

The alleged uncertainty to which the respondents refer deals only with the effect of a release on non-signatory joint tort-feasors; disputes may arise as between the signatories to a release whether the rule regarding joint tort-feasors is the common law rule or the rule urged by petitioners. It is submitted that a prospective releasee will be concerned about the effect of a release on alleged joint tort-feasors only when he is still in league with them. If they are his competitors and he has no agree-

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Leh v. General Petroleum, 330 F.2d 288 (9th Cir. 1964), reversed by unanimous Court 86 S.Ct. 203 (1965); *Continental Ore v. Union Carbide & Carbon Corp.*, 289 F.2d 86 (9th Cir. 1961), reversed by unanimous Court 370 U.S. 690 (1962); *Simpson v. Union Oil Co. of California*, 311 F.2d 764 (9th Cir. 1963), reversed 377 U.S. 13 (1964).

ments with them, or has discontinued any previous agreements, he will have no stake either in plaintiff's further prosecution of the action or the commencement of a new action. We find it difficult to understand, otherwise, why an antitrust defendant would be discouraged from resolving *its* dispute with plaintiff simply because plaintiff may have a right of additional recovery from others. Respondents' argument, which suggests that there is some unexpressed, implied agency relationship between the releasee and non-signatory co-conspirators, is but an articulation of the "trap" which defendants will ingeniously "spring" if this case is not reviewed.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, petitioners respectfully urge that a writ be issued to review the decision of the Ninth Circuit in this case.

Dated, San Francisco, California,
January 12, 1966.

Respectfully submitted,

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